

# Shared Responsibility and Multinational Enterprises

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**Abstract** The relationship between public international law and multinational enterprises (MNEs) has over the last decades emerged as one of the most hotly debated topics in theory and practice. Arguments have often been voiced for the creation of international law obligations binding on MNEs. Such obligations may serve as a deterrent to corporate conduct with nefarious consequences for the enjoyment by individuals of their human rights and the environment. The current article approaches the state-MNE relationship through the analytical lens of ‘shared responsibility under international law’. Thus, it assesses whether the current system of international responsibility rules provides the necessary tools to allocate responsibility between states and MNEs in situations where these actors contribute to harmful outcomes proscribed by international law. Second, it will turn to the potential pathways for the implementation of such responsibility on an international and domestic level. Finally, the article will provide an overview of the key standard-setting initiatives undertaken within the framework of the United Nations in relation to the conduct of MNEs. Ultimately, the international legal system allows for various conceptualisations of the ‘shared responsibility’ between states and MNEs, which operate in parallel towards the closing of the perceived ‘accountability gap’ associated with the conduct of MNEs.

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## 1 Introduction

The rise of the multinational enterprise, and the perceived threat it posed to newly independent and, more generally, developing states generated considerable concern among international lawyers throughout the second half of the twentieth century, as this new type of corporation was considered capable of undermining those states' sovereignty. So much can be gleaned from Judge Padilla Nervo's polemical Separate Opinion in *Barcelona Traction*, wherein he stated that:

It is not the shareholders in those huge corporations who are in need of diplomatic protection; it is rather the poorer or weaker States, where the investments take place, who need to be protected against encroachment by powerful financial groups, or against unwarranted diplomatic pressure from governments who appear to be always ready to back at any rate their national shareholders, even when they are legally obliged to share the risk of their corporation and follow its fate ... Perhaps modern international business practice has a tendency to be soft and partial towards the powerful and the rich, but no rule of law could be built on such flimsy bases.<sup>1</sup>

A similar point was made in a Report prepared by the Department of Economic and Social Affairs of the United Nations (UN) in 1973. The Report noted that '[g]overnments often feel a lack of power to deal effectively with powerful multinational corporations'.<sup>2</sup>

The common thread running through these statements is the increasing *power* of multinational enterprises (MNEs), which was perceived as antagonistic to that of sovereign states. Indeed, in the years to follow, those not enamoured of MNEs would often compare the economic power of the latter to that of developing states, highlighting the growing disparity between the two.<sup>3</sup> The assumption was that MNEs, with support from their home states, would bring their economic power to bear upon developing states, in which they operated, in order to circumvent national regulation in furtherance of their profit.

From the 1970s onwards, discussions on MNEs became a staple fixture on the UN agenda. Amidst calls for a 'New International Economic Order', views on the beneficial or destructive role of MNEs 'were held with religious fervour and

<sup>1</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Reports 1970, p. 3 (*Barcelona Traction*), pp. 248, 250 (Judge Padilla Nervo, Separate Opinion).

<sup>2</sup> UN Department of Economic and Social Affairs, 'Multinational Corporations in World Development', UN Doc. ST/ECA/190 (1973), p. 43.

<sup>3</sup> One should here note that Seidl-Hohenveldern had cautioned against these comparisons suggesting that 'economic power is also not necessarily equated with political power. From a formalistic point of view, even the weakest State disposes of legislative and police powers, which even the strongest multinational enterprise does not possess *as its own*.' Seidl-Hohenveldern (1986), p. 35 (emphasis in the original).

certainty, and led to evangelical prescriptions'.<sup>4</sup> As a result, discussions on the regulation of MNEs on an international level became bogged down. Eventually, after the mid-1980s, the controversy started to subside, as developing states became more keen on luring foreign direct investment.

Nonetheless, ever since the end of the Cold War, MNEs have once more appeared on the radar of international lawyers and such appearance is owed to a string of inter-related socio-economic phenomena with significant political ramifications. First, the onset of the elusive—in definitional terms—globalisation<sup>5</sup> has essentially contributed to a 'denationalisation'<sup>6</sup> of economic and social activities, evidenced by the increase in cross-border capital and technology mobility, as well as in societal exchanges. From a legal point of view, the process of globalisation is intertwined with the conclusion of global and regional trade agreements, whose main thrust is the liberalisation of investment. Overall, international trade law has created a permissive and protective legal and regulatory environment for MNEs.<sup>7</sup> The renewed concern with the operations of MNEs is further related to the trend towards privatisation. States have been delegating their functions to corporate entities, which in turn are entrusted with the running of hospitals and prisons, the supply of energy, and the provision of security services. MNEs 'have entered what used to be in many countries "reserved" state businesses in the "public service" fields'.<sup>8</sup> Privatisation thus has a double-edged effect. On the one hand, MNEs discharging public functions emerge as 'new fragmented centres of power ... [which means that] the individual now perceives authority, repression and alienation in a variety of new bodies'.<sup>9</sup> On the other hand, MNEs nowadays not only antagonise sovereign states in economic, but also in functional terms.

Interestingly, the end of the Cold War did not only herald the advent of an era conducive to the growth of MNEs' powers, but it also spawned the information revolution, which has been instrumental in reinvigorating the question of the regulation of MNEs on an international plane. Voluminous reports now exist, containing allegations that corporations have knowingly assisted repressive governments to commit human rights abuses, contributed to extraordinary and illegal renditions of terrorist suspects, or co-operated with governments to silence those opposing their projects. MNEs are once more perceived as entities which, due to their power and complex organisational structure, have the capacity to stand 'above the law' and to negatively impact on the enjoyment of individuals' human rights and the environment. States are unable—or in some cases unwilling—to enforce the fundamental rules of the international legal order, when this would conflict with the interest of the MNEs. According to a candid description offered by

<sup>4</sup> Rubin (1995), p. 1276.

<sup>5</sup> According to Vagts, globalisation refers to the 'process through which natural and legal impediments to the movement of economic elements across national frontiers are being ground away'. See Vagts (2003), p. 798.

<sup>6</sup> Delbrueck (1993), p. 11; von Bogdandy (2004), p. 888.

<sup>7</sup> Muchlinski (2007), p. 25.

<sup>8</sup> Reinisch (2005), p. 75.

<sup>9</sup> Clapham (1993), p. 137.

Henkin, ‘no sovereign State, and not all state sovereignties together, seem to be sovereign enough to solve the problems that these developments have brought to our human society at the end of the twentieth century’.<sup>10</sup>

In the light of the above, clarion calls have been made to the effect that international law obligations should be imposed upon MNEs especially in relation to human rights and the environment. The rationale behind these calls is that international law is the only potentially efficient means of curbing the nefarious consequences of the conduct of MNEs. An exhaustive analysis of the merit of MNEs being directly regulated by international law falls outside the scope of the present article, and the question has already been debated at length.<sup>11</sup> Rather, the focus will rest on the implication of states and MNEs in harmful outcomes, which international law seeks to prevent, and the sharing of international responsibility among them. In other words, the article will examine the operation of MNEs through the analytical lens of ‘shared responsibility’.<sup>12</sup> First, the article will offer a working definition of the concept of the MNE. Second, it will explore the possibility of attributing responsibility under positive international law to states, and potentially to MNEs, for their contribution to harmful outcomes. Third, it will assess the implementation of ‘shared responsibility’ situations by national and international courts, with a view to identifying possible merits or pitfalls in the synergies between the two levels of adjudication. Finally, the viability of UN standard-setting initiatives concerning MNEs and human rights will be scrutinised as alternative methods of preventing harmful outcomes.

## 2 Defining the Multinational Enterprise

Prior to discussing any aspect of the responsibility of MNEs, one should provide some insight as to what the term ‘multinational enterprise’ actually means. In his seminal article on the issue, Vagts defined the MNE as ‘a cluster of corporations of diverse nationality joined by ties of common ownership and responsive to a common management strategy’.<sup>13</sup> A similar definition was adopted in the Report prepared by the UN Group of Eminent Persons, according to which ‘multinational corporations’ are ‘enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private; they can also be co-operatives or state-owned entities’.<sup>14</sup> Yet, the use of the term ‘multinational corporation’ created a rift among the UN Economic and Social Council

<sup>10</sup> Henkin (1999), p. 6.

<sup>11</sup> See generally Jaegers (2002); Alston (2005); Clapham (2006); Zerk (2011); De Jonge (2011); Karavias (2013).

<sup>12</sup> On the concept of ‘shared responsibility’ see Nollkaemper and Jacobs (2013), pp. 360–361; Nollkaemper (2014b), pp. 6–12.

<sup>13</sup> Vagts (1970), p. 740.

<sup>14</sup> Report of the UN Group of Eminent Persons, The Impact of Multinational Corporations on Development and on International Relations, UN Doc. E/5500/Add 1 (Part I) (24 May 1974), reproduced in 13 ILM 800 (1974), p. 25.

(ECOSOC) members, with Latin American states arguing that ‘the term “multinational corporation” denotes an enterprise in which a number of States participate. [The] term for corporations operating beyond their own frontiers is transnational’.<sup>15</sup> Indeed, the United Nations, and more specifically ECOSOC, eventually embraced the term ‘transnational corporations’.<sup>16</sup>

The content of the terms ‘multinational enterprise’ and ‘transnational corporation’ remain contested. The terms have been employed by various authors and bodies to denote a variety of corporate structures. Ultimately, neither of the two terms has a fixed meaning in international law, and the use of one over the other remains a matter of taste. Nonetheless, despite the terminological divergence, one could infer from the above definitions some of the key characteristics of the ‘multinational enterprise’ from a legal point of view. First and foremost, an MNE owns and operates assets and controls their use across national frontiers. Essentially, the MNE will consist of a parent company, which controls a network of legally discrete subsidiaries, which are in turn incorporated in several countries. Second, this complex of discrete entities constitutes a single economic unit, responsive to the managerial direction of a sole decision-making centre.<sup>17</sup> According to Muchlinski, ‘the national identity of the various operating companies disappears, even though such identity continues on a formal level through the requirement of incorporation under the laws of the various States, in which the MNE operates’.<sup>18</sup> The image that one typically conjures up when speaking of the MNE is that of a ‘pyramid’, namely of a ‘parent company which owns and controls a network of wholly or majority-owned subsidiaries, which may themselves be intermediate holdings for sub-groups of closely held subsidiaries’.<sup>19</sup>

It is true that the structure of the MNE is far more complex than that of a corporation domiciled within a single jurisdiction and, therefore, it may be considered as a form of business organisation, whose regulation on the international plane merits closer consideration with a view to closing any accountability gaps. At the same time, one cannot disregard the possibility of a corporation domiciled in a single state wielding enough power to contribute, in co-operation with that state, to a harmful outcome prescribed by international law.

<sup>15</sup> Statement by the Peruvian Ambassador Jose de la Puente before the UN Group of Eminent Persons, reproduced in Aramburú Menchaca (1976), p. 358. Interestingly, this argument reverberated for years to come. Rigaux thus wrote: ‘we no longer speak of *multinational* corporations (or enterprises), as the use of this adjective gives the mistaken impression that the company or enterprise has national status in various different countries. The term *transnational* more correctly refers to a form of autonomy which corporations with establishments scattered over the territories of several States have been able to acquire in their relations with each of them.’ See Rigaux (1991), p. 121 (emphasis in the original).

<sup>16</sup> See, for example, Programme of Action on the Establishment of a New International Economic Order, A/RES/S-6/3202 (1 May 1974), section 5; ECOSOC Res. 1913, UN Doc. E/5570/Add.1 (1974).

<sup>17</sup> Cf. Fatouros (1971), p. 326.

<sup>18</sup> Muchlinski (2007), p. 7.

<sup>19</sup> Muchlinski (2007), p. 56. For a detailed analysis of the various configurations of the MNEs’ legal form, see Muchlinski (2007), pp. 51–78.

### 3 Corporations and the Law of International Responsibility<sup>20</sup>

In accordance with the dominant paradigm under international law, international responsibility operates on the basis of the fundamental notions of independent and exclusive responsibility.<sup>21</sup> Under the principle of independent responsibility, a state incurs responsibility ‘for its own conduct’. Intertwined with the principle of independent responsibility is the principle of exclusive responsibility, according to which ‘[i]n practice, conduct is commonly attributed to one actor only’.<sup>22</sup>

The key legal mechanism, upon which the principle of independent responsibility is based, is that of attribution of conduct. Attribution serves to identify the conduct, which can be linked to a state, thus potentially generating its international responsibility. In the Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), it is stated that:

In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority.<sup>23</sup>

If the truth be told, corporations do not feature prominently in the codification of the law of international responsibility. The main reason for this is that they are not in principle considered to be direct addressees of international law obligations, i.e. of primary international law norms, and therefore their conduct cannot set in motion the operation of secondary international law rules. In the words of Crawford and Olleson, ‘no general regime of responsibility has developed to cover them’.<sup>24</sup> Yet, this does not mean that corporations are excluded from the ambit of the international responsibility of states *in toto*. On the contrary, the conduct of corporations is directly relevant from an international law perspective, when it comes to the operation of the rules on attribution of conduct. Thus, the conduct of a corporate entity, albeit private, can be attributed to the state should there exist a requisite link between the corporation and the state, thus potentially generating that state’s responsibility. This link manifests itself in various ways. Such a link may be normative in the sense that a corporation may be ‘empowered by the law of the State to exercise elements of governmental authority’, and thus corporate conduct may be attributed to the state, provided the corporation ‘is acting in that capacity in that

<sup>20</sup> The present analysis will focus in principle on the international responsibility of states, since it is with states that MNEs predominantly interact.

<sup>21</sup> Nollkaemper and Jacobs (2013), p. 381.

<sup>22</sup> Nollkaemper and Jacobs (2013), p. 383.

<sup>23</sup> Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA Commentary), 38.

<sup>24</sup> Crawford and Olleson (2014), p. 445.

particular instance'.<sup>25</sup> Besides, corporate conduct may be attributed to a state if the corporation 'is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct'.<sup>26</sup> In the words of the International Law Commission (ILC), the question of attribution in this respect turns on the existence of a 'specific *factual* relationship between the person or entity engaging in the conduct and the State'.<sup>27</sup>

It becomes apparent from the above that the rules on state responsibility do not turn a blind eye to the operation of private corporations, and what is more, these rules are actually amenable to corporate conduct. Nonetheless, the operation of MNEs in particular creates the following conundrum. Host states often enter into contracts with subsidiaries of MNEs, which are domiciled in the host state. A host state may then use such a subsidiary as its 'long arm' with a view to perpetrating a violation of its international law obligations. In such a case, the conduct of the subsidiary may be attributed to the host state. Of course, the subsidiary is not a freestanding actor. As stated above, its operation is under the managerial control of the parent company. In other words, the parent company, and by extension the home state, may be implicated in the commission of an international law violation, which arises from the conduct of a subsidiary abroad. Thus, one could speak of the 'shared responsibility' of the home and the host state, or even of the host state and the MNE, for the contribution to a single harmful outcome. The next sub-sections will turn to the examination of these attribution scenarios with a view to ascertaining whether they square with existing rules on international responsibility.

### 3.1 Shared Responsibility of the Home and Host States

The literature on the role of the relationship between home and host states has for many years departed from the assumption that MNEs are based in developed countries, whereas their affiliates are incorporated in developing countries. The key idea behind this assumption is that there exists a disparity in power between the home and host state, which the MNE will use to its own advantage, mainly to circumvent national laws. Whereas there may be some truth in this assumption, one should not overlook the fact that foreign direct investment by MNEs from developing countries has been increasing incessantly over the last two decades.<sup>28</sup> At the same time, the perceptions on the role of host states have become somewhat more nuanced, as there have been instances where developing host states have not only abstained from regulating corporate entities, but where they have actively co-operated with them in perpetrating human rights abuses.<sup>29</sup>

<sup>25</sup> See Art. 5 of the Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA).

<sup>26</sup> See Art. 8 ARSIWA.

<sup>27</sup> ARSIWA Commentary, 47 (emphasis added).

<sup>28</sup> According to UNCTAD, foreign direct investment by transnational corporations from developing countries in 2013 reached a record high of USD 545 billion. See UNCTAD, World Investment Report 2014, United Nations Publication, Geneva, p. xiv.

<sup>29</sup> For example, in 1998, the ILO Commission of Inquiry examining allegations of forced labour in Myanmar reached the conclusion that '[t]here is substantial evidence before the Commission showing the

Yet, one should note here that the perceptions as regards the role of the host state have been shifting. More specifically, international and regional human rights bodies, in espousing the conception of a ‘horizontal application’ of human rights, have produced ample case law as regards the positive obligations of states to uphold human rights in the relationships between individuals and private entities, such as corporations.<sup>30</sup> Thus, a host state that is a party to an international or regional human rights convention will in principle find itself obliged to regulate corporate conduct within its jurisdiction under international law.

A number of writers suggest that such obligations of the host state should also be complemented by corresponding obligations of the home state. The latter should be held responsible for breaching the obligation to regulate the activity of its corporate nationals abroad, which flows from the ‘general duty’ of states under international law ‘not to act in such a way as to cause harm outside [their] territory’.<sup>31</sup> This argument, of course, goes against the grain of the dominant position in international law, which could be summarised as follows: ‘A subsidiary is a separate legal entity and therefore necessarily distinct from its parent ... as a matter of international law, parent and subsidiary are each subject to the exclusive jurisdiction of their respective sovereigns. They cannot be identified.’<sup>32</sup>

The ‘home state obligation’ and the dominant ‘corporate veil’ arguments can both be qualified. It appears that there is no cogent reason to deduce an obligation of the home state from a general duty of ‘due diligence’ by way of analogy, especially when international practice in this respect is lacking. On the contrary, in the single instance that an international body pierced the ‘corporate veil’, it did so via a dynamic interpretation of international human rights law—and admittedly using very subtle language. Thus, the Committee on the Elimination of Racial Discrimination in its 2012 Concluding Observations regarding Canada noted that it ‘is concerned that the State Party has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside Canada, in particular in mining activities’ and it went on to recommend that Canada should ‘take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable’.<sup>33</sup>

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Footnote 29 continued

pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military ... sometimes for the profit of private individuals’. ILO Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), 2 July 1998, para. 528.

<sup>30</sup> For an overview of the case law on the positive human rights obligations of states to regulate the conduct of private corporations, see Karavias (2013), pp. 30–59.

<sup>31</sup> McCorquodale and Simmons (2007), p. 617; in the same vein, Sornarajah (2001), p. 505.

<sup>32</sup> Mann (1984), p. 56. Cf. de Brabandere (2010), p. 78.

<sup>33</sup> CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination—Canada, UN Doc CERD/C/CAN/CO/19-20 (4 April 2012), p. 4.



Turning to the question of the responsibility of home and host states, the situation could be fitted within the corsetry of the existing rules of international responsibility. Thus, the home state—assuming that it bears an international law obligation to regulate the conduct of its corporate nationals abroad—and the host state would both independently incur international responsibility for a breach of their respective obligations of due diligence. In this situation, the two states would act—or fail to act to be more precise—independently and incur responsibility for different breaches in respect of the same injury.<sup>34</sup> The responsibility in this case only appears to be ‘shared’, in the sense that the failure of two states to act contributes to a single wrongful outcome, yet in principle such responsibility would rest with the home and host state separately.

One could envisage a situation, though, where the home and host states would incur ‘shared responsibility’ for the same wrongful act. This would be the case if the conduct of a subsidiary were to be attributed both to the host state and the home state of the MNE. Whilst the question of dual or multiple attribution generated considerable debate in theory, it is now accepted that the law of international responsibility does not preclude such a possibility.<sup>35</sup> A dual attribution to the home and host states of the conduct of a subsidiary presupposes the existence of the requisite normative or factual link, as described above. A normative link would exist if the home state of an MNE and the host state of a subsidiary of that MNE established a joint consortium, which contracted with the said subsidiary, while both states empowered it by virtue of their national legislation to exercise elements of governmental authority in respect of the operation of the joint consortium.

The dual attribution of the conduct of an MNE subsidiary to the home and host states on the basis of a factual link presents a different challenge. According to Article 8 ARSIWA, the subsidiary should be under the instructions, direction or control of both states. As Messineo has noted, ‘this may seem to imply that “effective” control can be “effective” with relation to more than one subject of international law at the same time’.<sup>36</sup> Still, whereas a higher threshold of factual control is necessary for control to be considered ‘effective’, no such threshold needs to be met in respect of ‘instructions’. The rule on ‘instructions’ can lead to multiple attribution, as it is possible for someone to ‘have received general instructions to carry out a certain conduct by a state ... and then to be under the more specific “effective” control of another state ... when carrying out the orders’.<sup>37</sup> Of course, the question of the influence exercised by the home state on the subsidiary operating in the host state, and whether this amounts to ‘instructions’ in the sense of international responsibility, is one of the thorniest politically, as well as practically due to the complex structure of the MNEs. Nonetheless, it is noteworthy that the general formulation of the ARSIWA seems to keep the door ajar for discussions of the ‘shared responsibility’ of the home and host states.

<sup>34</sup> See in this respect the analysis in Crawford (2013), pp. 333–336.

<sup>35</sup> See Messineo (2014), p. 62.

<sup>36</sup> Messineo (2014), pp. 77–78.

<sup>37</sup> Messineo (2014), p. 78.

### 3.2 Shared Responsibility between the MNE and the Host State<sup>38</sup>

The more interesting question is that of attributing responsibility to the host state and the MNE when they contribute to a single harmful outcome, thus the two incurring shared responsibility. The first issue to be addressed is the requisite capacity of a person or entity to incur responsibility under international law. Furthermore, one has to assess whether the attribution of responsibility to a non-state actor could take place on the basis of analogies drawn to the existing rules of responsibility, as codified by the ILC.

State responsibility is based on '[o]ne of the principles most deeply rooted in the doctrine of international law ... [namely] that any conduct of a State which international law classifies as wrongful entails the responsibility of that State in international law'.<sup>39</sup> A justification for this principle is the legal nature of the obligations that international law imposes on its subjects.<sup>40</sup> The system of international responsibility, as is the case with any given legal order, operates as a guarantee of its subjects behaving in accordance with the obligations binding on them.<sup>41</sup> Thus, a quintessential requirement of international responsibility is the existence of a primary international obligation binding upon a person.<sup>42</sup>

This line of thought was pushed further in the context of the ILC's codification of the rules on the international responsibility of international organisations. According to Gaja, 'responsibility under international law may arise only for a subject of international law. Norms of international law cannot impose on an entity primary obligations or secondary obligations in case of breach of one of the primary obligations unless that entity has legal personality under international law. Conversely, an entity has to be regarded as a subject of international law even if only a single obligation is imposed on it under international law'.<sup>43</sup> States and international organisations have a common trait, namely they both possess international legal personality, from which flows their capacity to incur international responsibility. Therefore, it appears only logical to suggest that the fundamental principles of state responsibility, as codified in Articles 1 and 2 ARSIWA, are 'easily transposable to international organizations and seem hardly questionable'.<sup>44</sup>

International personality, then, is seen as a threshold that once met enables international law to attach responsibility to a given entity. Whether this logic is

<sup>38</sup> Of course, responsibility must be allocated to a specific entity. One might argue that the subsidiary would suffice. However, this would not allay the fears of accountability gaps. Therefore, mention is made throughout to the MNE, assuming, as explained below, that a specific obligation exists addressed to the MNE.

<sup>39</sup> Ago (1971), p. 205.

<sup>40</sup> Ago (1971), p. 205.

<sup>41</sup> See Verdross (1964), p. 373; Cotteneau (1991), p. 3.

<sup>42</sup> Graefrath (1984), p. 21.

<sup>43</sup> Gaja G, First Report on responsibility of international organizations, UN Doc. A/CN.4/532 (2003), p. 110. The circularity of this statement is somewhat evident, but one has to bear in mind that circular reasoning permeates discussions on international personality as a whole. See the interesting analysis in Klabbbers (2005), p. 35.

<sup>44</sup> Gaja 2003, *supra* n. 43, p. 115.

helpful in relation to MNEs and—more generally—to private corporations merits further consideration. In handing down its *Reparation for Injuries* Advisory Opinion, which centred on the international legal personality of the United Nations, the International Court of Justice (the ICJ or the Court) dissociated sovereignty and subjectivity under international law, thus paving the way for the enlargement of the circle of international law subjects. As the Court noted: ‘The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community’.<sup>45</sup> Thus, international law rules ‘may select different entities and endow them with different legal functions’.<sup>46</sup>

Turning to private corporations, there is a body of theory that suggests that they do not possess international legal personality,<sup>47</sup> whilst others note that this question remains an open one.<sup>48</sup> Public international law is rather parsimonious as to the existence of international law obligations binding directly on corporations. Exceptionally, though, this may be the case. Thus, it has been argued that corporations entering into a contract for exploration for polymetallic nodules with the International Seabed Authority (ISA) incur obligations under international law, since states themselves have consented to this possibility in the UN Convention on the Law of the Sea (LOS).<sup>49</sup> These corporations, on the basis of this contract, and in accordance with the respective LOS provisions, may in turn incur responsibility under international law for a wrongful act in breach of the contract.<sup>50</sup> The international responsibility of corporations in this respect seems to be following the basic tenets of the law of international responsibility, namely that the breach by an entity of its international obligations may engage that entity’s international responsibility.

One might venture even further and suggest that corporations conducting exploration activities in the Area on the basis of a contract with the ISA may incur international responsibility because they possess the requisite measure of international personality.<sup>51</sup> Yet, this personality stems from, and is closely intertwined with, the life of the contract. If a corporation were to terminate its contract with the ISA, it would not continue to possess any free-standing measure of international legal personality. The crux of the matter is that corporations, unlike states and international organisations, are not presumed to be subjects of international law. Their personality is exclusively coterminous with the scope of the obligations imposed upon them by states. Thus, when it comes to corporations, one might agree with Gaja that they incur responsibility because they are subjects of international

<sup>45</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, p. 178.

<sup>46</sup> O’Connell (1970), p. 80.

<sup>47</sup> Crawford (2012), p. 122; Graf Vitzthum (2010), p. 166; Castell and Derycke (2000), p. 155.

<sup>48</sup> Shaw (2008), p. 250; cf. Wouters (2006), p. 109.

<sup>49</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (LOS). On the international law nature of these obligations, see Karavias (2013), pp. 136–143.

<sup>50</sup> Karavias (2013), pp. 143–148.

<sup>51</sup> Cf. Plakokefalos (2013), pp. 396–398.

law, yet their subjectivity cannot be dissociated or disjointed from their obligations. Thus, when it comes to entities that are not categorically recognised by international law as its subjects, it is not their personality or subjectivity, in an abstract and reified form, that constitutes the root of their capacity to incur international responsibility, but the fact that they possess a number of international law obligations. To argue for the recognition of a corporation's responsibility irrespective of the existence of any obligation binding upon it would risk throwing open the floodgates to 'buck-passing'.

The existence of an international law obligation should therefore form a necessary condition for the attachment of responsibility under international law, either under the dominant paradigm or the 'shared responsibility' one. Thus, the shared responsibility of the MNE and the host state for their contribution to a harmful outcome, such as a human rights abuse, is theoretically conceivable if both entities are bound by a set of international human rights law rules. An assessment as to whether such obligations binding on MNEs exist falls outside the scope of the present article. The following analysis will proceed on the basis of the assumption that MNEs do have the requisite capacity to incur shared responsibility under international law.<sup>52</sup>

MNEs may become implicated in human rights abuses if in some way they facilitate states' capacity to commit human rights abuses through the provision of financial, logistical or technological support.<sup>53</sup> Therefore, the first port of call, when visualising how such shared responsibility is to be allocated to the MNE, is the responsibility for aiding and abetting another. Aiding and abetting, or complicity, is a term used both in international and national law and may thus have a variety of meanings. Since the present analysis is concerned with the question of shared responsibility in international law, it is only apposite that one approaches such a question through the analytical tool of responsibility for aiding and abetting as formulated in the framework of international responsibility.<sup>54</sup> This methodology arguably finds support in the case law of the ICJ, which employed Article 16 ARSIWA as an appropriate tool when assessing the collaboration between Serbia and the Republika Srpska, a non-state entity. The ICJ held that although Article 16 ARSIWA 'concerns a situation characterised by a relationship between two States, [and it] is not directly relevant to the present case, it nevertheless merits consideration'.<sup>55</sup> One could extrapolate from this dictum that the core of aiding and

<sup>52</sup> There are a number of scholars who accept that multinational corporations are subject to international human rights obligations. See Paust (2002), p. 810; Stephens (2002), pp. 75–78.

<sup>53</sup> The following section is preoccupied with the situation where the MNE contributes to the commission of a human rights abuse by a state. This, of course, does not preclude the following two scenarios: (a) the contribution on behalf of a state to a human rights abuse committed by an MNE and (b) the possible 'shared responsibility' of the MNE and the state for separate wrongs, which result in the same harmful outcome.

<sup>54</sup> See Art. 16 ARSIWA and Arts. 14, 58 Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).

<sup>55</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 (*Bosnian Genocide*), p. 217, para. 420.

abetting can be transposed to the relationship between a state and an MNE in order to gauge the shared responsibility incurred by a state aided by an MNE, but also vice versa.

The first exercise would be to identify and describe the normative content of the elements of complicit conduct starting from the material element. The co-operation between MNEs and states manifests itself in a variety of forms, as infinite as the possible contractual agreements between the two. Yet, it is doubtful whether all forms of co-operation can be branded as complicit. Curiously, the ILC Commentary to Article 16 does not discuss this point. On the contrary, it includes two seemingly contradictory statements. First, it states that the assistance must be ‘clearly linked’ to the wrongful act, and make a ‘significant’ contribution to it.<sup>56</sup> Then it posits that ‘the assistance may only have been an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered’.<sup>57</sup> Indeed, the simultaneous existence of these statements muddies the waters regarding the requisite causal link between aid or assistance and the wrongful act. Turning to the analysis offered by the ILC in the context of the responsibility of international organisations, the ILC underlined that ‘for international responsibility to arise, aid or assistance should contribute “significantly” to the commission of the act’.<sup>58</sup> Indeed, setting a higher threshold seems to be the better interpretation, since it appears implausible that responsibility for aiding and assisting should follow from conduct, which would be only remotely linked to the wrongful act.<sup>59</sup>

If we were to apply the ‘significant contribution’ test to the relationship between MNEs and states, it would mean that an MNE would risk incurring responsibility for aiding and assisting first and foremost where its contribution was a *conditio sine qua non* of the commission of the wrongful act. Thus, a state might only be capable of committing forced evictions on a massive scale if an MNE provides it with the appropriate construction vehicles used to demolish houses. Equally, an MNE might provide a state with the necessary mining equipment or know-how in order to enable it to execute mining operations in blatant disregard of the human rights of the population living around the mining area. Yet, as stated above, the contribution of the assisting party need not be essential, but significant. In such a case the human rights violation would have taken place irrespective of the aid or assistance of the MNE, nonetheless the latter’s contribution impacted on the manner in which the violation was committed, or aggravated the harmful outcome. A repressive state may have a track record of inhumanely treating its citizens. Should an MNE provide it with incapacitating weapons, stun guns or tasers, then it essentially facilitates the commission of the violation.

An analysis of the ways in which a corporation may become implicated in the commission of a human rights violation does not stop at the contributory conduct.

<sup>56</sup> ARSIWA Commentary, 66.

<sup>57</sup> ARSIWA Commentary, 67.

<sup>58</sup> Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), 37.

<sup>59</sup> Nolte and Aust (2009), p. 10.

There is a second element that has to be scrutinised, namely the subjective element.<sup>60</sup> Article 16 ARSIWA speaks of aid or assistance with ‘knowledge of the circumstances of the internationally wrongful act’.<sup>61</sup> The Commentary to Article 16 goes a step further by suggesting that ‘aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so ... A State is not responsible for aid and assistance under article 16 unless the relevant State organ *intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct’.<sup>62</sup> Indeed, it is this second interpretation of the subjective element that the Court appears to favour in its *Bosnian Genocide* case, where it held that ‘the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be regarded as complicity unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator’.<sup>63</sup> According to Nolte and Aust, the words ‘at the least’ used by the Court suggest that ‘as a general rule, more than mere knowledge is required’.<sup>64</sup>

Turning anew to the MNE-state relationship, the most clear-cut, and perhaps the most extreme, case would be that of an MNE which shares the intent of the wrongfully acting state. A plausible scenario of this kind would involve an MNE, which has agreed with the state that its military forces will ensure the availability of workforce, even through forced labour. Yet, a lower, as it were, threshold might suffice. Thus, if the MNE is aware that its conduct will most likely contribute to the commission of human rights violations, then it could be attributed responsibility for aiding and abetting. Such knowledge may stem from information that is publicly available, in the form of human rights bodies’ case law or domestic cases, or from information that has become available to the MNE from a non-governmental organisation or a local community.

In the factual situations contemplated above, an MNE may incur derivative responsibility for its implication in the commission of a wrongful act. In most scenarios, the MNE will in principle be acting lawfully when it is providing technological, logistical or financial support to a state. Yet, through its actions the MNE kick-starts a causal relationship between itself and the aid it provides and the commission of an internationally wrongful act by the principal wrongdoer, namely the state. It is because of this causal relationship that the MNE incurs responsibility. Indeed, to the extent that the subjective element of aiding and abetting responsibility is met, then the MNE by proxy condones or even encourages the commission of an internationally wrongful act.

<sup>60</sup> The usual caveat would apply here, namely that corporations, or any other legal persons for that matter, do not have a separate will or cognition facility from that of natural persons directing and participating in their operations.

<sup>61</sup> In this sense, the Commentary notes that: ‘If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility’. ARSIWA Commentary, 66.

<sup>62</sup> ARSIWA Commentary, 66 (emphasis added).

<sup>63</sup> *Bosnian Genocide*, p. 218, para. 421.

<sup>64</sup> Nolte and Aust (2009), p. 14.

Whether other rules attributing international responsibility to a state for the action of another can be transposed to the state-MNE relationship is a different question. One may here refer to the ARSIWA which, apart from aiding and abetting, provide for the responsibility of a state that ‘directs or controls’ (Article 17 ARSIWA) or ‘coerces’ (Article 18 ARSIWA) another state to commit an internationally wrongful act. These situations are admittedly premised on a different normative base. Thus, as regards ‘control’ in the context of Article 17 ARSIWA, the ILC refers to the ‘domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern’,<sup>65</sup> whereas it takes ‘direction’ to connote ‘actual direction of an operative kind’.<sup>66</sup> The bar is set even higher when it comes to ‘coercion’, as it suggests that: ‘Nothing less than conduct which forces the will of the coerced State will suffice’.<sup>67</sup> In all these three situations, responsibility is attributed to a state because it exercises a high level of control over another state. It is dubious, and ultimately highly unlikely, that an MNE can exercise such control over a state to a degree where that state’s ‘authority over its actions’<sup>68</sup> is eclipsed. As noted in the introduction to this article, the concern about the MNEs’ growing economic power has been a recurring theme in international practice. The idea is that this economic power has the capacity to mutate into political power. Nonetheless, irrespective of the size of the MNEs’ economic power, the latter is not commensurate to the political power of the sovereign,<sup>69</sup> and therefore cannot serve as a normative basis for the attribution of responsibility.

#### 4 Implementation of Shared Responsibility by International and National Courts

Admittedly the complexity in international relations which flows from the increasingly frequent cooperative endeavours between states and a plurality of other actors does not square with the realities of international dispute settlement procedures, or domestic ones for that matter. One would be hard pressed to find judicial cases dealing with the allocation of responsibility to a plurality of wrongdoers, mainly due to jurisdictional limitations. Besides, international judicial and quasi-judicial bodies, such as human rights monitoring mechanisms, operate on the basis of consent by the states parties to their respective constituent treaties, which means *inter alia* that their jurisdiction *ratione personae* does not extend to include corporations as defendants.<sup>70</sup> Conversely, domestic courts called upon to examine claims against MNEs for their implication in human rights abuses will not in principle have jurisdiction to pronounce on the legality of state action, as the state itself would not be sued. Yet, even in the unlikely instance where the state would be

<sup>65</sup> ARSIWA Commentary, 69.

<sup>66</sup> ARSIWA Commentary, 69.

<sup>67</sup> ARSIWA Commentary, 69.

<sup>68</sup> On authority over actions, see Eagleton (1928), p. 152.

<sup>69</sup> Seidl-Hohenveldern (1986), p. 35.

<sup>70</sup> The sole exception in this respect appears to be the LOSC deep seabed dispute settlement regime.



sued, such action would probably fail on account of the sovereign immunity of that state. This situation, albeit in accordance with the basic tenets of international law, may be conceived as problematic in cases of ‘shared responsibility’ since the jurisdictional limitations in place will prevent courts from allocating responsibility to multiple entities.

The most prominent example of domestic case law concerning harmful outcomes flowing from the co-operation of states and MNEs is the Alien Tort Statute (ATS) saga concerning ‘corporate complicity’ claims brought before the United States (US) courts.<sup>71</sup> The ATS, which grants district courts ‘original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’,<sup>72</sup> was applied to corporations in a string of lower court cases, which culminated in the US Supreme Court *Kiobel* ruling. The petitioners in *Kiobel*, a group of Nigerian nationals residing in the US, alleged that they were victims of human rights abuses taking place in the Nigerian province of Ogoniland, and more specifically that the defendant oil corporations had aided and abetted the Nigerian government in committing those violations. For Justice Roberts, who delivered the Opinion, the crucial question was whether ‘a claim [under the ATS] may reach conduct occurring in the territory of a foreign sovereign’.<sup>73</sup> Roberts went on to answer the question in the negative, holding that the presumption against extraterritoriality applied to the ATS.<sup>74</sup> The *Kiobel* decision at least *prima vista* seems to close the door to future litigation against foreign corporations, and for that reason it has been widely criticised.<sup>75</sup>

Irrespective of the future of ATS litigation, the existing ATS case law is significant from a ‘shared responsibility’ perspective, as it touches upon the contribution of MNEs to human rights abuses committed by a sovereign. In other words, it deals with factual patterns, which could be brought to the attention of an international body called to assess the responsibility of the state assisted in an abuse by an MNE. Indeed, the allegations of the Ogoni population concerning the implication of multinational oil companies in the violation of their human rights by Nigeria, considered by the US Courts in *Kiobel*, were further scrutinised by the African Commission of Human and Peoples’ Rights in *Serac*.<sup>76</sup> Before the Commission, it was argued that the Nigerian government, through its oil state company acting as a majority shareholder in a consortium with Shell Petroleum Development Company, had exploited ‘oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways ... [and as a result the] contamination of water, soil and air has had serious short and long-term health impacts’.<sup>77</sup>

<sup>71</sup> On the application of ATS to corporations, see Koebele (2009); Fletcher (2008).

<sup>72</sup> Alien Tort Statute, 28 USC Section 1350 (ATS).

<sup>73</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (*Kiobel*), p. 1664.

<sup>74</sup> *Kiobel*, p. 1666.

<sup>75</sup> See Colangelo (2013), p. 1329; McCorquodale (2013).

<sup>76</sup> *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, Communication No. 155/96 (2001) (*Serac*).

<sup>77</sup> *Serac*, para. 2.



What sets *Serac* apart is the fact that the violations complained of were the result of the actions of a consortium in which both the state and an MNE participated. Nonetheless, the Commission's mandate extends to the examination of the actions by a state party to the African Charter of Human and Peoples' Rights (AfrCharter) and does not include the capacity to scrutinise the actions of MNEs.<sup>78</sup> In its analysis of Article 4 AfrCharter on the right to life, however, the Commission noted that a violation had indeed taken place '[g]iven the widespread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not)'.<sup>79</sup> The Commission then went on to make an ambivalent statement regarding MNEs. While it held that 'the Nigerian government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis', it also noted that '[t]he intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities'.<sup>80</sup> Whatever the direction or provenance of the last statement, it remains undoubted that the Commission in *Serac* was faced with a situation of 'shared responsibility' that it could not assess in its totality due to jurisdictional limitations.

It is argued that in cases of harmful outcomes resulting from the actions of multiple wrongdoers, one should look beyond the jurisdictional limitations to possible interactions between international and national dispute settlement bodies called upon to adjudicate 'shared responsibility' cases arising from the same factual patterns.<sup>81</sup> Of course, one should not lose sight of the fact that the powers and procedures of international judicial and quasi-judicial bodies may differ radically from those of national courts. Furthermore, international bodies and national courts will in principle be called upon to interpret different sets of rules. Therefore, the interaction envisaged in this respect deviates from theories of 'transnational judicial dialogue'.<sup>82</sup> The key question is not whether courts attach weight to the findings of other courts on the content of a given primary norm but whether they should attach weight, and if so to what purpose, whilst determining the responsibility of a particular defendant.

When it comes to domestic courts, there is a string of reasons that would militate for their taking into consideration findings of breach by human rights courts or treaty bodies. Especially in the context of ATS litigation, domestic courts were faced with motions to dismiss relying on various grounds, which invariably related to the fact that a foreign sovereign state was implicated in the litigation.<sup>83</sup> Reliance

<sup>78</sup> African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981, in force 21 October 1986, 21 ILM 58 (1982) (AfrCharter). According to Art. 56 (2) AfrCharter, communications are admissible if they 'are compatible with the Charter of the Organisation of African Unity or with the [African] Charter'. This has been interpreted to mean that communications against individuals will be declared inadmissible. See Viljoen (2002), pp. 72–75.

<sup>79</sup> *Serac*, para. 67.

<sup>80</sup> *Serac*, paras. 58, 69.

<sup>81</sup> See in this respect, Nollkaemper (2014a), p. 809.

<sup>82</sup> See Waters (2004–2005); Burke-White (2004).

<sup>83</sup> Thus, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (SDNY 2003), Counsel for the defendants invoked the act of state doctrine, the hindrance of US foreign policy, the political question doctrine and the failure to join an indispensable party.

on a finding of breach by a human rights court or treaty body may counteract separation-of-powers or comity arguments. Finally, such reliance may pave the way for grounding the responsibility of an MNE for aiding and abetting a human rights violation that has already been established.

Equally, there are good grounds for international dispute settlement bodies to take into consideration decisions by domestic courts, and these predominantly relate to the access to facts. Human rights courts and treaty bodies do not operate in the same manner as domestic courts. Their capacity to hear oral testimony or receive evidence will depend on the respective rules of procedure and the willingness of the respective court or body to do so.<sup>84</sup> Overall, it has been suggested that whilst proceedings before international tribunals include oral hearings, the hearings historically, and with the exception of international criminal tribunals, did not necessarily involve the oral testimony of witnesses.<sup>85</sup> In the light of the above, it becomes apparent that to the extent that domestic courts issue decisions, which set forth a detailed version of crucial facts, international courts should accord them due consideration as evidence, since this could enable them to have a clearer picture of the exact role of the co-responsible parties implicated in each case.

Of course, in both cases described above, caveats apply as to the weight to be attached to the respective findings. Neither national courts nor international bodies will be called upon to treat the decisions of another as carved in stone, let alone as precedent. Indeed, they should tread with caution taking into consideration that they operate on different planes, outside a common normative framework. Courts will have to assess the weight to be attached to a decision of another taking into consideration the independence, the procedural fairness, as well as the standard or burden of proof of the court in question.<sup>86</sup>

## 5 Alternative Conceptions of Responsibility in the Standard-Setting Activities of the UN

As noted above, the onset of globalisation and the proliferation of reports on the implication of MNEs in gross human rights abuses have generated efforts to submit MNEs to international law as a means of closing the accountability gap.<sup>87</sup> The most recent manifestation of these efforts is the adoption by the UN Human Rights Council of a resolution calling for the ‘elaboration of an international legally binding instrument on transnational corporations and other business enterprises with

<sup>84</sup> As regards the Human Rights Committee, it has been argued that ‘under the terms of the Optional Protocol, the Committee is confined clearly to an evaluation in the light of all “written” information made available to it’. Gandhi (1998), p. 309. On the contrary, the African Commission of Human and Peoples’ Rights has displayed ‘a willingness to accept any form of evidence ... as well as oral hearings.’ Murray (2002), p. 102.

<sup>85</sup> Cf. Pasqualucci (2003), p. 194.

<sup>86</sup> For a more detailed analysis, Nollkaemper (2014a), pp. 839–846.

<sup>87</sup> See Joseph (1999), p. 185.

respect to human rights'.<sup>88</sup> Still, if one were to take a macroscopic look at international practice, one would realise that since the 1970s states have dealt with the question of MNEs through the setting of non-binding standards.<sup>89</sup> Especially during the last two decades, there has been an explosion in the number of instruments and initiatives addressed to MNEs. These initiatives are no longer exclusively crafted by states. On the contrary, they range from codes of conduct drafted by corporations themselves, to reporting initiatives devised by non-governmental organisations, to guidelines adopted by international organisations. Such an infinite variety renders any attempt at classification extremely difficult. Nonetheless, one can point to a series of characteristic traits, which appear to set these new initiatives apart from similar efforts in the past.

First and foremost, all initiatives and standards post-Cold War build on human rights as the key point of reference, with the addition of environmental and anti-corruption clauses. International human rights rules, originally drafted in the image of their domestic public law counterparts and addressed to states, are now seen as carrying a symbolic value which transcends societal relations, and therefore such rules are seen as equally transposable to the context of corporate operations. Second, in recognition of the complex relations created between states and MNEs, recent initiatives have turned the concept of 'corporate complicity' into 'the kernel of attempts to hold corporations accountable for human rights abuses'.<sup>90</sup> The idea of 'complicity' highlights the potential for MNEs to significantly contribute to, or enhance the ability of, a state to perpetrate gross human rights abuses. In other words, it underlines the harmful consequences that may flow from the cooperation between states and corporations.

The analysis will focus solely on those standard-setting activities that have taken place within the framework of the United Nations. The UN has served as a fertile testing ground for the creation of novel types of initiatives governing the relationship between MNEs and human rights. However, even within the UN there has been considerable tension as to the nature and form of the initiatives. Suffice it here to note that two schools of thought have dominated the field: those supporting a legalisation of standards and those opting for a corporate governance approach. The next sub-sections will seek to assess the extent to which these initiatives address the sharing of responsibility among states and MNEs.

## 5.1 Introductory Lessons in Corporate Governance: the UN Global Compact

The UN Global Compact (GC), launched in 2000, has evolved into one of the largest corporate responsibility initiatives.<sup>91</sup> The GC is neither 'legally binding', nor

<sup>88</sup> Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', UN Doc A/HRC/26/L.22/Rev.1 (25 June 2014).

<sup>89</sup> On the history of standard-setting activities in the framework of the UN, see Sagafi-nejad (2008). On the relevant ILO and the OECD instruments, see Muchlinski (2007), pp. 473–507.

<sup>90</sup> Clapham (2006), p. 563.

<sup>91</sup> According to the United Nations Global Compact website, the initiative has nowadays grown to more than 12,000 participants, including over 8,000 businesses.

is it a ‘code of conduct’. It is a ‘purely voluntary initiative, [that] does not police or enforce behaviours or actions of companies. Rather it is designed to stimulate change and to promote good corporate citizenship’. It also serves as a ‘platform—based on universal principles—to encourage innovative initiatives and partnerships with civil-society, governments and stakeholders’.<sup>92</sup> It becomes apparent from the start that the GC breaks with the traditional modes of standard-setting employed by the United Nations.<sup>93</sup>

Participating businesses are expected to integrate the ‘Ten Principles’ into their business strategy, their everyday operations and their decision-making processes.<sup>94</sup> Particularly as regards human rights, businesses are called upon to ‘support and respect the protection of internationally proclaimed human rights’ and to ‘make sure that they are not complicit in human rights abuses’.<sup>95</sup> According to the GC Commentary, ‘[c]omplicity basically means being implicated in a human rights abuse that another company, government, individual, group etc. is causing’.<sup>96</sup> Complicity consists of ‘[a]n act or omission ... by a company, or individual representing the company, that “helps” (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, and ... [t]he knowledge by the company that its act or omission could provide such help’.<sup>97</sup>

One cannot help but notice the elusiveness with which the basic tenets of the GC are being described. Indeed, it is not entirely clear what behaviour participating businesses are called upon to follow. Especially with regard to ‘complicity’, the GC casts the net wider than international responsibility rules on aiding and abetting, or international criminal law rules for that matter. This is perhaps so because of the nature of the GC, which is not geared towards assigning any form of responsibility for contributions to injury. Indeed, the GC does not come with an enforcement mechanism, which is only logical in the light of the fact that it does not set forth norms or standards to which corporations are bound.

## 5.2 A Turn towards Legalisation: the 2003 UN Norms

Prior to the launching of the GC, the UN Sub-Commission on the Promotion and Protection of Human Rights had embarked upon the project of restating those international legal principles applicable to businesses with regard to human rights, with a view to securing corporate accountability.<sup>98</sup> The idea behind this standard-setting activity was summarised as follows: ‘All in all business enterprises have increased their power in the world. International, national, state and local lawmakers are realising that this power must be confronted, and the human rights obligations of

<sup>92</sup> See the GC website’s section entitled ‘Frequently Asked Questions’, United Nations Global Compact website, <https://www.unglobalcompact.org/>, accessed 11 February 2015 (GC website).

<sup>93</sup> For contrasting views on the merits of the GC, see Coleman (2003), p. 339; and King (2001), p. 482.

<sup>94</sup> See the GC website’s section entitled ‘How to participate’.

<sup>95</sup> See Principles 1 and 2 GC.

<sup>96</sup> See the GC website section entitled ‘Global Compact Principle Two’.

<sup>97</sup> See the GC website section entitled ‘Global Compact Principle Two’.

<sup>98</sup> On the drafting history of the UN Norms, see Weissbrodt and Kruger (2003), pp. 903–907.

business enterprises, in particular, must be addressed'.<sup>99</sup> The outcome of the Sub-Commission's work was the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms).<sup>100</sup>

The UN Norms signalled a move away from the governance-oriented Global Compact towards the re-legalisation of the business-human rights conundrum. Indeed, the UN Norms 'follow a standard international law format'.<sup>101</sup> They enunciate the basic obligation of states and MNEs *vis-à-vis* human rights, then they list those human rights rules considered as relevant to corporate conduct, and finally they provide for implementation provisions.

Article 1 UN Norms distinguishes between states and MNEs—or TNCs as they are referred to throughout the instrument—by positing that states 'have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights', whereas '[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.' The formulation of this clause gives rise to a series of conceptual issues that need to be clarified. First and foremost, states are accorded the 'primary responsibility' *vis-à-vis* human rights. The use of the term 'responsibility' in this respect does not refer to responsibility incurred *ex post facto* for breaching an obligation. Rather, it is used as a synonym for the primary human rights obligations of states. In other words, the clause reflects the position of states as the primordial addressees of international human rights rules. Second, transnational corporations shoulder the 'obligation' to uphold human rights.

When it comes to outlining the content of this 'obligation', the Commentary to Article 1 suggests that corporations 'shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware'.<sup>102</sup> The analysis in the Commentary thus suggests that, apart from the primary human rights obligations of corporations spelled out in the UN Norms, corporations may also be held responsible for aiding and abetting. Whilst the Commentary impliedly recognises that complicity entails a material and a subjective element, what the threshold is remains unclear.

<sup>99</sup> Weissbrodt and Kruger (2003), p. 902.

<sup>100</sup> Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and Commentary, UN Doc. E/Cn.4/Sub.2/2003/38/Rev.2 (26 August 2003) (UN Norms).

<sup>101</sup> Kinley and Chambers (2006), p. 451.

<sup>102</sup> See Commentary (b) to Art. 1 of the UN Norms.

Apart from complicity, the concept of ‘sphere of activity and influence’ further corroborates the suggestion that the UN Norms’ drafters contemplated situations of ‘shared responsibility’ that could flow from the co-operation between—and by implication of the parallel exercise of power on behalf of—states and MNEs. The problem is that the concept does not come with a ‘legal pedigree’.<sup>103</sup> Indeed, the vagueness of the ‘sphere of influence’ concept, coupled with the silence of the Commentary to the UN Norms in this respect, generated criticism from states and corporations.<sup>104</sup> One can only theorise as to whether the ‘sphere of influence’ was intended to serve as a means of delimitating the content of the primary obligations of corporations, or as a yardstick to allocate responsibility. Irrespective of this, however, the assumption behind the ‘spheres of influence’ remains that to the extent that a harmful outcome is the result of conduct within the MNE’s ‘sphere of activity and influence’, then such conduct may lead to that MNE’s responsibility. Perhaps the use of the term ‘influence’ may suggest that the MNE is not seen as capable of exercising ‘control’, which may in turn always rest with the state. Yet, that does not mean that the MNE would be absolved from responsibility under the UN Norms in respect of its action *vis-à-vis* for example its employees, over which it exercises ‘influence’ on the basis of the contractual bond between the two.

Much ink has been spilt regarding the merits and deficiencies of the UN Norms, yet what is beyond dispute is their ‘enunciative audacity’ and their ‘zero tolerance’,<sup>105</sup> which led to their demise. Their adoption by the Sub-Commission was their high mark, as in a subsequent resolution the Commission on Human Rights suggested that the UN Norms had no legal standing,<sup>106</sup> a conclusion echoed by states throughout a consultation held on the UN Norms under the auspices of the Office of the High Commissioner for Human Rights.<sup>107</sup>

### 5.3 Striking a Pragmatic Approach: the United Nations Guiding Principles on Business and Human Rights

In the aftermath of states’ expressed hostility towards the UN Norms, John Ruggie, a key figure in the design of the Global Compact, was appointed as the UN Secretary-General’s Special Representative on Human Rights and Transnational Corporations. Ruggie sailed clear past the legalisation of the debate opted for by the drafters of the UN Norms, towards a middle of the road approach: MNEs were neither seen as direct addressees of international human rights law, nor at the same time operating in a legal vacuum.<sup>108</sup> Throughout his mandate he designed a

<sup>103</sup> Ruggie (2007), p. 825.

<sup>104</sup> Kinley et al. (2007), p. 37.

<sup>105</sup> Baxi (2005), pp. 2–3.

<sup>106</sup> Responsibilities of transnational corporations and related business enterprises with regard to human rights, CHR 2004/116 (22 April 2004), UN Doc. E/CN.4/DEC/2004/116.

<sup>107</sup> For an analysis of states’ submissions to this consultation, see Karavias (2013), pp. 78–81.

<sup>108</sup> Ruggie has voiced his disagreement with the choice of the drafters of the UN Norms ‘to take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well ... [t]hat assertion itself has little authoritative basis in international law—hard, soft, or otherwise’. Notwithstanding, he noted that ‘emerging practice and expert opinion increasingly do

tripartite framework, entitled ‘Protect, Respect, Remedy’, which is premised on three core principles: (a) the state duty to protect human rights; (b) the corporate responsibility to respect human rights; and (c) the need for more effective access to remedies.<sup>109</sup> The ‘corporate responsibility to respect human rights’ is a ‘baseline responsibility’ which operates ‘in addition to compliance with national law’ and whose scope is ‘defined by social expectations’.<sup>110</sup> The use of the term ‘responsibility’ as opposed to ‘duty’ ‘is meant to indicate that respecting human rights is not an obligation that current international human rights law generally imposes on companies, although elements may be reflected in domestic laws’.<sup>111</sup>

The fundamental concepts of the ‘Protect, Respect, Remedy’ framework provided the groundwork for the drafting of the ‘UN Guiding Principles on Business and Human Rights’.<sup>112</sup> According to Principle 11: ‘Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.’<sup>113</sup> Furthermore, the corporate responsibility to respect human rights requires business enterprises to ‘[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts where they occur’ (Principle 13). In order to ‘identify, prevent, mitigate and account for how they address their adverse human rights impacts’, business are called upon to ‘carry out human rights due diligence’ which includes assessing the impacts, integrating and acting upon the findings and communicating how impacts are addressed (Principle 17).

This ‘human rights due diligence’ is the key to operationalising the Guiding Principles. The potential impact of corporations on human rights is perceived as a ‘risk’, which can be addressed through ‘prevention or mitigation’, whereas the actual impact ‘should be a subject of remediation’.<sup>114</sup> Due diligence thus predominantly serves as a risk management tool, which when employed correctly can help businesses address human rights claims by demonstrating that ‘they took

Footnote 108 continued

suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes’. See Ruggie J, ‘Interim Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises’, UN Doc. E/CN.4/2006/97 (22 February 2006), paras. 60 and 69.

<sup>109</sup> See Ruggie J, ‘Protect, Respect, Remedy: A Framework for Business and Human Rights’, UN Doc. A/HRC/8/5 (7 April 2008).

<sup>110</sup> Ruggie (2008), *supra* n. 109, paras. 54, 55.

<sup>111</sup> Ruggie J, ‘Business and Human Rights: Further Steps towards the Operationalization of the “Protect, Respect and Remedy” Framework’, UN Doc. A/HRC/14/27 (9 April 2010), para. 55.

<sup>112</sup> Guiding Principles on Business and Human Rights and Commentary, Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, HR/PUB/11/04 (United Nations, 2011) (Guiding Principles). The Guiding Principles were endorsed by the Human Rights Council, ‘Human rights and transnational corporations and other business enterprises’, UN Doc. A/HRC/RES/17/4 (6 July 2011).

<sup>113</sup> It is important to note that the Commentary to Principle 11 of the Guiding Principles fleshes out a ‘savings clause’ in suggesting that the ‘corporate responsibility to respect human rights’ exists ‘independently of States’ abilities and/or willingness to fulfil they own human rights obligations, and does not diminish those obligations’.

<sup>114</sup> Guiding Principles, p. 18.



every reasonable step to avoid involvement with a human rights abuse'.<sup>115</sup> This form of due diligence does not speak to the content of a primary human rights norm binding on the corporation. On the contrary, 'due diligence' in the framework of the Guiding Principles has multiple functions: it 'serves an executive function, providing the information necessary for determining corporate action ... as a monitoring device—available for use by both internal and external stakeholders—to make accountability more efficient ... [as] a fact-finding and remediation function providing the basis for both the process and substantive content of resolving the consequences of human rights affecting actions'.<sup>116</sup> The reference to 'due diligence' in a governance instrument, though, should not be seen as devoid of legal implications. As has been argued, the Guiding Principles may lead, through their reliance on 'due diligence', to the crystallisation of 'a binding duty of care towards foreseeable potential victims of human rights infringements arising out of investment projects'.<sup>117</sup> Ultimately, the Guiding Principles are not grounded in a conception of responsibility as an *ex post facto* operation aimed at remedying the consequences of wrongful acts, but rather as an *ex ante* effort to establish standards of good corporate conduct that may contribute to the prevention of harmful outcomes.

## 6 Conclusion

It has been argued that '[m]ultinational enterprises create ... huge complications for traditional international legal concepts'.<sup>118</sup> The heated debates that have consistently plagued efforts to create a binding legal instrument in relation to the operation of MNEs, and specifically its impact on the enjoyment by individuals of their human rights, attest to the veracity of this statement. Nonetheless, this should not be taken to mean that the operation of MNEs falls squarely outside the ambit of existing international rules. Indeed, as the present analysis has showed, international law rules, and more specifically the rules on international responsibility, may be called into application in relation to MNEs. Thus, the conduct of a subsidiary of an MNE may be attributed both to the home and host state on the basis of the attribution rules enshrined by the ILC in its ARSIWA. Whether there exists 'shared responsibility' between the host state and the corporation itself is a thornier question. Any finding of responsibility under international law of the corporation *eo nomine* ultimately hinges on the affirmation of primary international obligations binding on that corporation *qua* legal person. Putting this matter aside, certain rules of state responsibility, such as the rule on aid and assistance, could be transposed to the state-MNE context. One could then suggest that the rules of international responsibility exhibit a certain measure of flexibility that allows them to capture complex legal situations involving non-state actors.

<sup>115</sup> Guiding Principles, p. 19.

<sup>116</sup> Backer (2012), p. 158.

<sup>117</sup> Muchlinski (2012), p. 167.

<sup>118</sup> Henkin (1989), p. 199.



Still, judicial practice in respect of ‘shared responsibility’ scenarios between states and MNEs is lacking. The US courts have been called upon to pronounce on the legality of corporate conduct abroad, without entering the fray as regards the legality of the conduct of the state, in which the corporation operates. Conversely, international treaty bodies and international courts have addressed the responsibility of states for human rights violations flowing from corporate conduct. Whereas current jurisdictional limitations both on the domestic and international level may render a finding of ‘shared responsibility’ of a state and an MNE improbable, one can identify potential positive synergies between the two levels of adjudication, e.g. in respect of available evidence.

The dearth of judicial findings by no means connotes the lack of international practice. On the contrary, the last two decades have witnessed a proliferation of MNE-related instruments negotiated within and outside the framework of international organisations. These initiatives open up a vista of various conceptions of responsibility. Indeed, the responsibility of MNEs is nowadays not solely understood in an *ex post facto* sense concerning the legal consequences attached to the perpetration of a harmful act, but also in an *ex ante* one. Thus, instruments such as the Global Compact and the UN Guiding Principles on Business and Human Rights employ the term ‘responsibility’ to signify the duty of MNEs to take proactive measures in order to avoid being implicated in harmful outcomes. Responsibility thus does not serve its traditional remedial role, but manifests itself as a risk management tool. Interestingly, this conception of responsibility is not solely addressed at MNEs but also states. Both entities should strive to take the measures necessary in order to prevent their implication in human rights abuses. Of course, this form of ‘shared responsibility’ is open to criticism from those who firmly believe that the only credible deterrent is for states and MNEs to be held responsible in law and provide reparation when they contribute to a harmful outcome proscribed by international law. Nonetheless, the conception of ‘shared responsibility’ does not exclude or vitiate the other. On the contrary, the accountability gap may be addressed more efficiently if both conceptions exist and operate in parallel.

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